NO. 50163-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTOINE SHAW,

Appellant.

BRIEF OF APPELLANT

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Assignment of Error

1. Substantial evidence does not support the defendant's conviction for second degree burglary because the record does not include any evidence that the defendant unlawfully entered or remained in a building.

2. Substantial evidence does not support the defendant's conviction for second degree theft because no evidence supports the conclusion that the defendant in any way aided or abetted the person who committed the theft.

3. Substantial evidence does not support the jury's finding that the defendant demonstrated or displayed an egregious lack of remorse.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction for second degree burglary when the evidence presented at trial indicates that the defendant entered an open store and then stole property by stepping behind a counter that was not marked as "employees only" and that customers occasionally entered unbidden?

2. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and under RCW 9A.08.020, does substantial evidence support a conviction for second degree theft when the evidence presented at trial indicates that the defendant entered a store with a second person who then stole merchandise without the defendant in any way aiding or abetting that conduct?

3. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and under RCW 9.94A.535(3)(q), does substantial evidence support a jury's finding that a defendant demonstrated or displayed an egregious lack of remorse when no evidence at trial supports that conclusion?

STATEMENT OF THE CASE

Factual History

Sometime around 5:00 pm on March 8, 2016, Tiffany Bartley was working as a sales clerk at the Port Orchard Sprint store when the defendant and a person by the name of Gary Harrison entered. RP 97, 110-111. Mr. Harrison asked Ms. Bartley about different purchasing plans and eventually settled on buying a post-paid phone. RP 113. While she was in the process of setting up the phone and contract the defendant asked to see a rosegold colored iPhone 6 plus. RP 114. The retail price for that phone is $749.99. *Id.* Upon hearing his request, Ms Bartley went back into the storage area and retrieved the phone the defendant requested. *Id.* After showing it to him, the defendant asked to see a prepaid flip phone that he said he wanted to purchase for his nephew. *Id.* Since that phone was also in the storage area Ms Bartley took the iPhone and placed it in an area behind the sales counter where customers usually do not enter. *Id.* However, Ms. Bartley later admitted that some customers did walk in that area to look at merchandise on the wall, that there were no signs indicating that it was an employee only area, and that she had never called the police to claim that those customers who had walked in that area were trespassing. RP 139-142.

When Ms. Bartley returned from the back she saw that both the defendant and the iPhone were gone. RP 114. Upon seeing this she asked Mr. Harrison to go out and get the defendant so she could talk to him. RP 118-119. Mr. Harrison complied with her request and eventually the defendant returned into the store. *Id.* Ms. Bartley then asked him about his interest in the iPhone and he stated that he really didn't have enough money to buy it. *Id.* Eventually he became upset and left saying that she was accusing him of stealing the phone. *Id.* After he left the store Ms Bartley finished setting up the phone for Mr. Harrison and he then left. RP 119. Once he left Ms Bartley reviewed the store security video, which showed the defendant going behind the counter and taking the iPhone when she went in the back of the store. RP 121-124. She then called the police and her store manager Michael Vallejo. RP 123.

After Mr. Vallejo got to the store he called Mr. Harrison and explained the situation. RP 156-157. Mr. Harrison told him that he would try to get the defendant to call him back. *Id.* A little later the defendant did call Mr. Vallejo using Mr. Harrison's phone. RP 161-163. During that conversation the defendant admitted stealing the iPhone and stated that he would bring it back to the store. *Id.* He did not do so. *Id.*

At about 6:20 pm that same evening the defendant and Mr. Harrison

entered the Sprint store in Silverdale. RP 166-168. Once inside the defendant asked a sales clerk by the name of Bea Analupa about prepaid iPhones and Mr. Harrison went to the display area to look at demo phones. RP 169-170. The demo phones are connected to the display island by wires used as security devices. *Id.* Ms. Analupa responded to the defendant's question by stating that she was not sure about prepaid iPhones and that she needed to go ask another employee, who was in the storage area of the store. RP 169. In fact that employee was in the bathroom and was not available to answer her questions. *Id.* Ms Analupa then returned to the sales floor to speak with the defendant. *Id.* As she did, she heard the alarms connected to the demo phones go off. RP 169-170. Initially Ms Analupa assumed that there was a false alarm, which happened quite often. *Id.* However, as she looked up she saw Mr. Harrison running out of the store with two iPhones he had cut from their security cables. RP 170-171.

Upon seeing Mr. Harrison run out of the store Ms. Analupa went over to the door because she saw the defendant walking over to leave. RP 172, 175-176. She then attempted to lock the door to keep the defendant inside. *Id.* As she did so the defendant asked her what she was doing and why she was locking the door. *Id.* When she refused to move the defendant used his elbows and arms to push Ms Analupa out of the way

and he then left the store. *Id.* As a result of this incident Ms Analupa ended up with bruises on her arm and thigh, as well as a swollen thumb and fingers. RP 182-185. The combined value of the two cell phones that Mr. Harrison took was around $1,400.00. RP 187.

Procedural History

By information filed March 15, 2016, the Kitsap County Prosecutor charged the defendant with one count of second degree robbery. CP 1-6. The prosecutor later amended this information to replace the robbery charge with one count of second degree burglary for the defendant's conduct of going behind the counter at the Port Orchard store and taking the cell phone, one count of third degree theft for taking that phone, one count of second degree theft for the two cell phones Mr. Harrison took from the Silverdale store, and one count of second degree assault against Ms. Analupa under an allegation that he committed that assault during the commission of a felony. CP 107-111.

This case eventually came on for jury trial with the state calling six witnesses: Investigating Officers Pronovost and Meyer, Sergeant Hall, who worked for the Kitsap county jail, Tiffany Bartley and Michael Vallejo from the Port Orchard Sprint store, and Bea Analupa from the Silverdale store. RP 95, 108, 149, 155, 166, 210. They testified to the facts set out in the

preceding factual history. *See* Factual History, *supra.*

In addition, Officer Meyer explained that during the investigation he went to the Kitsap County jail and interviewed the defendant, who denied being at either of the stores and denied being acquainted with Gary Harrison even though there was a picture of the defendant on Gary Harrison's facebook page showing that he was one of Mr. Harrison's friends. RP 221-222. When Officer Meyer showed the defendant the store security videos the defendant denied that it was him. *Id.* In fact, according to Officer Meyer the defendant seemed quite disinterested during the whole interview. *Id.*

During Officer Meyer's testimony he also identified excerpts from five telephone calls the defendant made while in jail during which he spoke about the charges against him. RP 249-250. The court admitted these recorded excerpts into evidence and provided a transcript of the calls for the jury to follow when the prosecutor played the recordings for them. RP 246-248; CP 123-131. On cross-examination, Officer Meyer admitted that during one of the defendant's calls to his mother the defendant told her: "I was inside the store when someone else took something out of the store." RP 261. This conversation was not included in the recordings played for the jury. RP 257-261. In addition, during trial the court admitted the

security videos from the two stores into evidence and played them for the jury. RP 173-180.

Following the close of the state's case the defense rested without calling any witnesses. RP 263, 331. The defense then moved to dismiss the burglary charge, the second degree theft charge, the assault charge and the egregious lack of remorse claim on the basis that substantial evidence did not exist to prove that (1) the defendant unlawfully entered and remained in the Port Orchard Sprint store, (2) that the defendant was an accomplice to Mr. Harrison's theft of the two cell phones at the Silverdale store, (3) that the defendant committed the assault against Ms. Analupa in furtherance of the commission of a felony, or (4) that the defendant acted with "egregious lack of remorse." RP 263-278. The trial court denied each motion except as to the second degree assault charge, which charge it dismissed as unsupported by substantial evidence. RP 284-306.

Following instructions the parties presented their closing arguments and the jury retired for deliberation, eventually returning verdicts of guilty on the three remaining charges. RP 331-353, 355, 387, 392-395; CP 306-338, 340. The jury also returned special verdicts that the state had not proven that the defendant had committed the burglary with "egregious lack of remorse" but had proven that the defendant committed the theft with

an "egregious lack of remorse." RP 341-342.

The court later sentenced the defendant to 45 months on the burglary charge, 264 days concurrent on the third degree theft charge, and 45 months concurrent on the second degree theft charge. The 45 months on the burglary charge was within the standard range of 43 to 57 months. CP 413-423. However, the standard range on the second degree theft charge was 14 to 18 months and the 45 months the court imposed was an exceptional sentence based upon the jury's finding of "egregious lack of remorse." *Id.* Following imposition of sentence the defendant filed timely notice of appeal. CP 425-426.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR SECOND DEGREE BURGLARY BECAUSE THE RECORD DOES NOT INCLUDE ANY EVIDENCE THAT THE DEFENDANT UNLAWFULLY ENTERED OR REMAINED IN A BUILDING.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id.

"Substantial evidence" in the context of a criminal case, means

evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence "that the defendant was the one who perpetrated the crime." *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant with second degree burglary under RCW 9A.52.030, which states as follows:

> (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.
>
> (2) Burglary in the second degree is a class B felony.

RCW 9A.52.030.

In order to sustain a verdict under this statute the record must

contain evidence that (1) that the defendant unlawfully entered or remained in a building, and (2) that the defendant had the intent to commit a crime "therein." In the case at bar substantial evidence supports the second element of the crime. Specifically, there is substantial evidence that at the time the defendant was in the Port Orchard Sprint store he had the intent to steal. However, as the following explains, substantial evidence does not support the conclusion that the defendant unlawfully entered or remained in that store.

Entry into a business otherwise open to the public is not rendered unlawful by a defendant's intent to commit a crime therein. *State v. Miller,* 90 Wn.App. 720, 954 P.2d 925 (1998). As the court noted in *Miller,* "Washington courts have never held that violation of an implied limitation as to purpose is sufficient to establish unlawful entry or remaining." *Miller,* 90 Wn.App. at 725-726. For example, in *Miller* the defendant went to a self-service car wash and broke open the coin boxes where customers pay to start the water sprayer for the service bay in which the coin box sits. He was subsequently convicted of burglary for that conduct and appealed arguing that his intent to steal did not withdraw the implied consent he had to be in the area where the coin boxes were located. The Court of Appeals agreed and reversed, holding that the defendant's criminal intent did not

revoke the implied consent the business maintained for customers to be in the area where the coin boxes were located. *Miller*, 90 Wn.App. at 729-730 (citing *State v. Deitchler*, 75 Wn.App. 134, 876 P.2d 970 (1994)).

In the case at bar the issue presented to this court is whether or not the area behind the counter where the defendant walked to pick up the iPhone was impliedly open to the public as opposed to an area used exclusively by the store employees. The following facts are relevant to the determination of this question: (1) Ms. Bartley the store sales clerk who placed the phone behind the counter stated that the store's intent was that the area behind the counter be an employee only area, (2) there were no signs or other physical indicators that a customer could not walk in that area, (3) there was no claim of any physical barrier such as a door or rope cordoning off that area, (4) there was merchandise on the wall that could only be accessed by walking in that area, (5) Ms. Bartley had occasionally seen customers walking in that area to get to the merchandise on the wall, and (6) no store employee had ever claimed that a person in that area was trespassing or walking in an area limited to employees only. RP 139-142.

Under these facts as presented at trial a reasonable person would believe that this area was impliedly open to the public. As such, the defendant's entry into that area, even with the intent to commit a crime,

did not constitute an unlawful entry or remaining. Consequently, substantial evidence does not support a finding that the defendant committed the crime of burglary and this court should reverse that conviction and remand with instructions to dismiss that charge and resentence on the remaining felony conviction.

II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR SECOND DEGREE THEFT BECAUSE NO EVIDENCE SUPPORTS THE CONCLUSION THAT THE DEFENDANT IN ANY WAY AIDED OR ABETTED THE PERSON WHO COMMITTED THE THEFT.

As was stated in the first argument in this brief, due process under both the Washington Constitution and the United States Constitution requires the state to prove every element of a crime charged beyond a reasonable doubt and forbids conviction without substantial evidence to support each element of that offense. *State v. Baeza, supra*; *In re Winship, supra*. In the case at bar the defendant argues that his conviction for second degree theft out of the incident in the Silverdale Sprint store is unsupported by substantial evidence because there is no evidence in the record to support the conclusion that he acted as an accomplice to Gary Harrison's theft of the two phones from that store. The following sets out this argument.

Under RCW 9A.08.020(3) the legislature has defined the term

"accomplice" as follows:

> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) Aids or agrees to aid such other person in planning or committing it; or
>
> (b) His or her conduct is expressly declared by law to establish his or her complicity.

RCW 9A.08.020(3).

Under this statute, the defendant must take some affirmative action in promoting the offense; mere presence, even if that presence "bolsters" or "gives support" to the perpetrator, does not constitute action sufficient to impose accomplice liability. *In re Welfare of Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979) (juvenile's presence, knowledge of theft and personal acquaintance with active participants was insufficient to constitute abetting crime of reckless endangerment without some showing of intent to encourage criminal conduct). In addition, substantial evidence, whether on the issue of criminal liability as a principal or an accomplice, must be based upon more that mere speculation, surmise and conjecture. *State v.*

Uglem, 68 Wn.2d 428, 413 P.2d 643 (1966).

For example, in *State v. Asaeli*, 150 Wn.App. 543, 208 P.3d 1136 (2009), a defendant convicted of second degree murder as an accomplice appealed his conviction, arguing that the evidence only showed mere presence and was insufficient to prove accomplice liability. The facts of this case were as follows. In the early morning hours of October 30, 2004, two groups of young people, most of Samoan descent, gathered at Thea Foss Park in Tacoma after the bar at which many of them were drinking closed. This park, which is in the Dock Street area of Tacoma's downtown waterfront, was a routine gathering place for young person's of Samoan descent. One of the groups at the park included Faalata Fola, and his cousin James Fola, who had arrived in a green Mercury driven by Tailulu Gago. Breanne Ramaley, Faalata Fola's girlfriend, was also present and had arrived separately with other friends in her red Nissan. Benjamin Asaeli was at the park, having driven there with his girlfriend Rosette Flores in her white Chevrolet Lumina. The defendant Darius Vaielua was present, having arrived driving his girlfriend's Ford Explorer. His girlfriend and Eroni Williams were passengers in that vehicle.

Once at the park, several persons, including the defendant DariusVaielua, walked around and asked people if Faalata Fola was present.

After a short time, Eroni Williams located Faalata Fola sitting in the driver's seat of the Nissan, which was parked between Gago's Mercury and the Lumina driven by the defendant Darius Asaeli. At this point, Eroni Williams challenged Faalata Fola to a fight, but moved back, claiming that Fola had a gun. As he stepped back, Benjamin Asaeli immediately stepped forward and fatally shot Fola multiple times as Fola remained seated in the Nissan. Benjamin Asaeli later confessed to shooting Fola, but claimed that he had acted in self defense after Fola pulled a gun, shot at Benjamin Williams, and then pointed the gun at him.

The state charged Benjamin Asaeli with first degree murder. The state also charged Benjamin Williams and the defendant Darius Vaielua with murder under the theory that they acted as accomplices to Benjamin Asaeli when he shot Fola. Following a lengthy joint trial, all three defendants were convicted. They appealed, urging a number of common arguments on appeal. The defendant Darius Vaielua also argued that the evidence presented at trial only showed mere presence on his behalf and was not legally sufficient to sustain a conviction as an accomplice. In addressing this latter claim, the court summarized the evidence against the defendant as follows:

> The trial testimony showed that (1) Asaeli, Asi, and Williams

> witnessed Fola shoot at a car with Asian men in it at Thea Foss Park a week before Asaeli shot Fola but that Vaielua was not present at the time; (2) a week later, Vaielua was at Papaya's Bar at the same time as Williams and Asaeli; (3) Vaielua spoke to Williams and Asaeli either at the bar or as they were all leaving the bar at closing time; (4) Asaeli did not ask Flores if she wanted to go to the waterfront until after speaking to the others as they were leaving the bar; (5) Vaielua did not normally go to the waterfront after the bars closed when he was with Ishmail; (6) after leaving the bar, talking to the others, and dropping Ishmail off, Vaielua drove the Explorer to Thea's Park at the same time Asaeli, Van Camp, and Asi drove to the park; (7) the three cars arrived at approximately the same time; (8) when Vaielua arrived, he had four passengers with him, including Williams; (9) before the shooting, Vaielua and the others exited the Explorer and Vaielua spoke and motioned to the people in the Explorer for several minutes; (10) also before the shooting, some of those who arrived with Vaielua spoke to Asaeli; (11) immediately before the shooting, Vaielua approached James, who he knew from prior peaceful encounters; and (12) after greeting James, Vaielua asked where "Blacc" was and then stood with James (with a car between them and Ramaley's car) until the shooting. Importantly, the evidence did not show what was said during any conversations Vaielua may have had or overheard that evening nor was there any evidence that any of these conversations related in any way to a plan to shoot or assault Fola.

State v. Asaeli, 150 Wn.App. at 568-569 (footnote omitted).

With this recitation of the facts in mind, the court reviewed the law on accomplice liability, and concluded that the facts were not legally sufficient to support a conviction. The court held:

> To prove Vaielua was an accomplice to Fola's murder, the State had to prove beyond a reasonable doubt that Vaielua (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity. RCW

> 9A.08.020(3). Taking the evidence in the light most favorable to the State, we conclude that, although there was evidence that Vaielua was present at the park, that he drove Williams and others to the park, and that he was aware that some members of the group he was with were was trying to locate Fola, the evidence failed to show that Vaielua was present at the scene with more than mere knowledge of some potential interaction with Fola.
>
> . . .
>
> At best, this evidence is sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate Fola. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot Fola.

State v. Asaeli, 150 Wn.App. at 569.

In the case at bar, as in *Asaeli*, the state had the burden at trial of proving that the defendant knew that his actions in the Silverdale Sprint store (1) would promote or facilitate Mr. Harrison's theft of the two phones, or (2) that he was present and ready to assist in some manner, and (3) that he was not merely present at the scene even if he had knowledge of potential criminal activity. In the case at bar there is substantial evidence to support a conclusion that the defendant knew that Mr. Harrison was going to commit a theft at the store. However, there is no evidence that the defendant was anything other than merely present in the store. He did not attempt in any way to hinder the clerk's attempts to apprehend Mr.

Harrison. Further, the defendant took no actions that in any way facilitated Mr. Harrison's commission of the theft. Thus, the only reasonable conclusion that can be drawn from the evidence is that the defendant was merely present in the store and that he might have had knowledge that Mr. Harrison intended to commit a theft. This does not constitute substantial evidence that the defendant acted as an accomplice to Mr. Harrison's crime. As a result this court should vacate the defendant's conviction for second degree theft and remand with instructions to dismiss this charge.

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE JURY'S FINDING OF THAT THE DEFENDANT DEMONSTRATED OR DISPLAYED AN EGREGIOUS LACK OF REMORSE.

In RCW 9.94A.535(3), the legislature has set out an exclusive list of aggravating factors upon which a trial court may justify imposition of a sentence in excess of the standard range if that fact is proven beyond a reasonable doubt to the finder of fact in the case. Subsection (q) of that statute states:

> (3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court.
>
> Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.
>
> . . .

> (q) The defendant demonstrated or displayed an egregious lack of remorse.

RCW 9.94A.535(3)(q).

Under RCW 9.94A.537(3) the legislature has provided procedures under which the finding under RCW 9.94A.525(3)(q) may be made. It states:

> (3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(3).

As was set out in RCW 9.94A.535(3)(q), a defendant's lack of remorse, if proven beyond a reasonable doubt, can justify imposition of an exceptional sentence. *State v. Creekmore*, 55 Wn.App. 852, 783 P.2d 1068 (1989), *review denied*, 114 Wn.2d 1020, 792 P.2d 533 (1990). However, before it can be so used the state bears the burden of proving that the lack of remorse was "egregious." *State v. Garibay*, 67 Wn.App. 773, 781, 841 P.2d 49 (1992). The issue whether or not a lack of remorse is sufficiently egregious to justify imposition of an exception sentence necessarily depends upon the facts of each case. *State v. Ross,* 71 Wn.App. 556, 861 P.2d 473, *review denied* 123 Wn.2d 1019, 875 P.2d 636, *amended* 71

Wn.App. 556, 883 P.2d 329 (1993). Finally, refusing to admit guilt or remaining silent in the exercise of one's rights is not an indication of lack of remorse and will not justify imposition of an exceptional sentence. *State v. Russell*, 69 Wn.App. 237, 848 P.2d 743 (1993).

For example, in *State v. Zigan,* 166 Wn.App. 597, 270 P.3d 625 (2012), the court found egregious lack of remorse supported by evidence in a vehicular homicide case that (1) the defendant asked the victim's husband if he was "ready to bleed?" moments after victim's wife died, (2) that the defendant was smiling and laughing while talking to officers at the crime scene, and (3) that once at the jail the defendant smiled and waved at other inmates and said "if you hit someone on a motorcycle, don't get caught." Similarly, in *State v. Erickson*, 108 Wn. App. 732, 737–40, 33 P.3d 85 (2001), the court found egregious lack of remorse proven by evidence of the defendant's conduct bragging and laughing about the murder he committed and joking about being on television. As a third example, in *State v. Stuhr,* 58 Wn.App. 660, 794 P.2d 1297, *review denied* 116 Wn.2d 1005, 803 P.2d 1309 (1990), the court found sufficient evidence to support a finding of an egregious lack of remorse from evidence that the defendant told his doctor that he was sorrier for the dog he had killed than for the victim, notwithstanding the fact that the defendant voiced an apology

during his sentencing hearing.

In the case at bar the state argued that three things supported a finding that the defendant had an "egregious lack of remorse." These were (1) the defendant's statements to Ms Bartley accusing her of falsely calling him a thief, (2) the defendant's failure to return the stolen phone from the Port Orchard Sprint store, and (3) the defendant's statements in his jail calls minimizing his culpability and attributing his legal predicament to his association with the wrong person. *See* State's Closing Argument, pages 375-379. The problem with this argument and with the jury's finding is twofold. First, in arguing an aggravating circumstance from the defendant's failure to admit guilt to Ms Bartley and failure to turn himself in with the phone to Mr. Vallejo, the state was arguing egregiousness from the defendant's failure to confess or admit guilt. As was noted in *State v. Russell, supra*, a defendant's exercise of his right to silence and failure to confess cannot form the basis for a finding of lack of remorse.

Second, while some of the defendant's statements made during jail calls might well show some lack of remorse, it is far from the "egregious" lack of remorse held in *Zigan, Erickson, and Stuhr* as sufficient to support imposition of an exceptional sentence. Indeed, if any modifier were to be properly put in front of a finding of "lack of remorse" for the defendant it

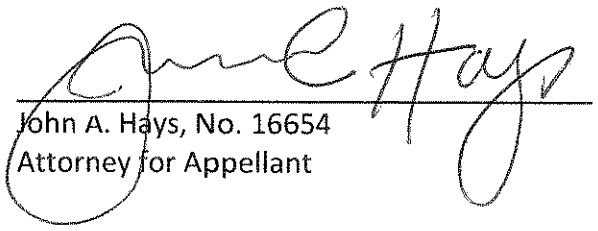
would have to be a "common" lack of remorse found in defendants who repeatedly commit crimes, particularly theft offenses, year after year such as the defendant, who, at the time of sentencing, had a theft 2 charge pending in another county, two theft 1 convictions from 2014, a theft 3 conviction from 2013, two prior obstructing convictions, and a prior burglary conviction. This is "common" lack of remorse and has already been considered by the legislature by increasing the defendant's standard range based upon his offender score. Thus, in this case, substantial evidence does not support the jury's verdict that the defendant demonstrated an "egregious" lack of remorse.

CONCLUSION

Substantial evidence does not support the defendant's convictions for second degree burglary, second degree theft, and does not support the jury's finding of egregious lack of remorse. As a result, this court should vacate the second degree burglary and second degree theft convictions and remand for resentencing without the aggravating factor.

DATED this 4th day of August, 2017.

Respectfully submitted,



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APPENDIX

RCW 9.94A.535(3)

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the

offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4) (a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

RCW 9A.08.020
Liability for Conduct of Another - Complicity

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He or she is a victim of that crime; or

(b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

RCW 9A.52.030
Burglary in the Second Degree

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

(2) Burglary in the second degree is a class B felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **ANTOINE SHAW,** **Appellant.**	**NO. 50163-5-II** **AFFIRMATION OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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2. Antoine Shaw, No.335792
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Dated this 4th day of August, 2017, at Longview, WA.

Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

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